

1 ROBERT H. BASIE
2 ATTORNEY AT LAW
3 SECURITY PACIFIC PLAZA
4 1300 THIRD AVENUE, SUITE 1700
5 SAN DIEGO, CALIFORNIA 92101
6 (714) 222-1700

7 (SPACE BELOW FOR FILING STAMP ONLY)

7 Attorney for Plaintiff

7 APR 22 1980

7 1980

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
10 FOR THE COUNTY OF SAN DIEGO

11 CINEMATRONICS, INC.,)
12 a California corporation,)
13 Plaintiff,) Case No. 451437
14 v.) DECLARATION OF DAVID
15 VECTORBEAM, a California) K. DEMERGIAN IN SUPPORT
16 corporation; EXIDY, INCORPORATED,) OF APPLICATION FOR
17 a California corporation;) TEMPORARY RESTRAINING
18 and DOES I through X, inclusive,) ORDER
19 Defendants.) [CCP §527(a)]
20
21)
22)
23)
24)
25)
26)
27)
28)

18 I, DAVID K. DEMERGIAN, declare that if called as a witness
19 I could competently testify of my own personal knowledge as to
20 the following facts:

21 1. I am law clerk to plaintiff's attorney of record,
22 ROBERT H. BASIE, and am therefore familiar with the facts and
23 circumstances surrounding the above-captioned matter;

24 2. On April 22, 1980, I contacted the Secretary of State's
25 office and thereupon learned that the defendant EXIDY, INCORPORATED
26 is a California corporation whose registered agent for service
27 of process is ROBERT NEWSON, 1536 Maple Street, Redwood City,
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3 California 94062.

4 3. On April 22, 1980, at the hour of 11:22 a. m. I called
5 the Corporate Offices of EXIDY, INCORPORATED and asked to speak
6 to Mr. Newson. I was told he was out of the office and a message
7 would not yet be left there. I then asked to speak to any
8 officer of the corporation and was told they were all in a meeting.
9 I thereupon secured from the receptionist at EXIDY, INCORPORATED
10 a phone number where Mr. Newson could be reached; that number being
11 (415) 369-0328. I thereupon called that number and asked the
12 receptionist if Mr. Newson was in and she replied that he was not,
13 but that he was expected. I then asked the receptionist if a
14 message left for him would certainly get to him when he arrived;
15 she replied that it would. I thereupon left a message for Mr.
16 Newson, pursuant to the mandates of CCP §527(a), that plaintiff
17 CINEMATRONICS, INC. would move the Superior Court of San Diego
18 County at 4:00 p. m. today for temporary restraining order and
19 order to show cause re preliminary injunction restraining EXIDY,
20 INCORPORATED from further commercialization of the Rosenthal
21 Vector Generating System. The receptionist thereupon assured me
22 that the message would be delivered to Mr. Newson upon his arrival.

23 4. On April 22, 1980, I contacted the Secretary of State's
24 office and thereupon learned that defendant VECTORBEAM is a
25 California corporation whose registered agent for service of
26 process is PHILLIP SEYMOUR DECARO, 20 Ciervos Road, Portola Valley
27 California 94025.

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3 5. I thereupon contacted the Corporate Offices of VECTOR-
4 BEAM at (415) 851-2560 and asked to speak to Mr. Decaro. Mr.
5 Decaro was out and I spoke therefore with GAIL GATTO who identified
6 herself as Mr. Decaro's assistant and asked her if a message was
7 left for Mr. Decaro if he would certainly get it. She replied
8 that he would and I thereupon advised her, pursuant to CCP 5527(a)
9 that plaintiff CINEMATRONICS, INC. would move the Superior Court
10 of San Diego for a temporary restraining order at 4:00 p. m.
11 today restraining VECTORBEAM from commercializing the Rosenthal
12 Vector Generating System. She thereupon assured me that she would
13 deliver the message to Mr. Decaro upon his arrival.

14. Attached hereto as EXHIBIT "A" is a true and correct
15. copy of the verified complaint filed April 21, 1980 in the
16. Superior Court for the County of San Diego. Further, your
17. declarant saith naught.

18

19 I declare under penalty of perjury that the foregoing is
20 true and correct to the best of my knowledge. Dated this
21 22nd day of April, 1980 at San Diego, California.

at San Diego, California

DAVID R. DEMERGIAN, Declarant

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ROBERT H. BACHE
ATTORNEY AT LAW
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2 ROBERT H. BABIE
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C O B P Y
ORIGINAL FILED
BUSINESS DIVISION
Y

APR 21 1980

5 Attorney for Plaintiff

6 ROBERT D. ZUMWALT
7 CLERK, SAN DIEGO COUNTY

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO

12 CINEMATRONICS, INC.,)
13 a California corporation,)
14 Plaintiff,)
15 v.)
16 VECTORBEAM, a California)
17 corporation; EXIDY, INCORPORATED,)
18 a California corporation;)
19 and DOES I through X,)
20 inclusive,)
21 Defendants.)
22
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451437

Case No.

COMPLAINT FOR
MONEY, DAMAGES,
ACCOUNTING AND
INJUNCTION

Plaintiff alleges:

FIRST CAUSE OF ACTION

I

Plaintiff is, and was at all times relevant hereto, a corporation duly organized and existing pursuant to the laws of the State of California with its principal place of business in the County of San Diego.

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Exhibit "A"

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II

4 Defendant VECTORBEAM is, and was at all times relevant
5 hereto, a corporation duly organized and existing pursuant to
6 the laws of the State of California with its principal place of
7 business in the County of Santa Clara.

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9 Defendant EXIDY, INCORPORATED is, and was at all times
10 relevant hereto, a corporation duly organized and existing pur-
11 suant to the laws of the State of California with its principal
12 place of business in the County of Santa Clara.

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14 Plaintiff is unaware of the true names and capacities of
15 the defendants sued herein as DOES I through X, inclusive, and
16 therefore sue said defendants by their fictitious names. Plaintiff
17 will seek leave to amend its complaint to allege their true names
18 and capacities when same has been ascertained. Plaintiff is
19 informed and believes and thereon alleges that each of the
20 fictitiously named defendants is responsible in some manner for
21 the occurrences alleged herein, and that plaintiff's damages as
22 herein alleged were proximately caused by such defendants.

v

24 Plaintiff is informed and believes and thereon alleges
25 that at all times relevant hereto each of the defendants was the
26 agent, employee, servant, principal, master and employer of each
27 of the remaining defendants, and in doing the things hereinafter

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3 alleged was acting within the scope of such agency and with
4 their permission, consent and/or ratification.

VI

6 On or about December 5, 1979, in the County of San Diego,
7 of the State of California, defendants VECTORBEAM and DOES I
8 through X, inclusive, made, executed and delivered to plaintiff
9 their promissory note for the sum of FIVE HUNDRED AND TWENTY-SIX
10 THOUSAND NINE HUNDRED AND FORTY-TWO DOLLARS (\$526,942). A true
11 and correct copy of said note is attached hereto as Exhibit "A"
12 and incorporated by reference herein.

VII

14 Said defendants has not paid any installments on the note
15 or any part thereof, except one payment of THIRTY-FIVE THOUSAND
16 DOLLARS (\$35,000), and as provided in the note, the balance
17 thereof is now due, owing and unpaid, together with interest thereon
18 from January 1, 1980.

VIII

20 By the terms of this note it is provided that in the event
21 legal action is taken to enforce collection thereof, the maker
22 promises to pay such sum as the court may fix as reasonable
23 attorney's fees therein. Plaintiff has retained the law offices
24 of Robert H. Basie to enforce the note and will thereby incur
25 attorneys' fees and costs.

27 WHEREFORE, plaintiff prays judgment against said defendants
28 as hereinafter set forth.

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3 SECOND CAUSE OF ACTION

4 I

5 Plaintiff hereby incorporates by reference the allegations
6 of Paragraphs I through VIII, inclusive, of its First Cause of
7 Action as though fully set forth herein at length.

8 II

9 On or about December 5, 1979, but prior to delivery to
10 plaintiff, defendant EXIDY, INCORPORATED and DOES I through X,
11 inclusive, as a part of the same transaction, endorsed and
12 guaranteed in writing the payment of the indebtedness evidenced
13 by the promissory note. A true and correct copy of said guarantee
14 is attached hereto as Exhibit "B" and incorporated by reference
15 herein.

16 III

17 There is now due, owing and unpaid to plaintiff from said
18 defendants on account of the promissory note the sum of FIVE
19 HUNDRED AND TWENTY-SIX THOUSAND NINE HUNDRED AND FORTY-TWO DOLLARS
20 (\$526,942) principal, together with interest from January 1, 1980.

21

22 WHEREFORE, plaintiff prays for judgment as hereinafter
23 set forth.

24 THIRD CAUSE OF ACTION

25 I

26 Plaintiff hereby incorporates by reference the allegations
27 of Paragraphs I through V, inclusive, of its First Cause of Action
28 as though fully set forth herein at length.

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3 II

4 At all times relevant hereto plaintiff was possessed of a
5 license to use, manufacture, distribute or otherwise commercial-
6 ize certain Vector Generator Systems for Video Games, together
7 with the parts of and improvements thereon, granted it by its
8 major stockholders, pursuant to patents held by them.

9 III

10 On or about December 5, 1979, defendant EXIDY, INCORPORATED
11 and DOES I through X, inclusive, entered into a written agree-
12 ment with plaintiff under which plaintiff sub-licensed to said
13 defendants the right to use, manufacture, distribute and otherwise
14 commercialize said Vector Generator Systems together with the
15 parts of and improvements thereon. The contract further provides
16 that defendant shall pay royalties to plaintiff of five (5%)
17 percent of the net sale's price per unit for the "Tailgunner"
18 Video Game but not less than ONE HUNDRED DOLLARS (\$100) no more
19 than ONE HUNDRED TWENTY DOLLARS (\$120) per unit and in an amount
20 equal to two and one-half (2-1/2) percent of the net sale's
21 price per unit on all units sold which incorporate only a sub-
22 stantial portion of plaintiff's Vector Generating Hardware
23 System. A true and correct copy of that contract is attached
24 hereto as Exhibit "C" and incorporated by reference herein.

25 IV

26 The contract provides that it is to go into effect December
27 1, 1979. The contract provides further "both parties shall,
28 at all times, keep an accurate account of all operations under

3 the scope of this cross-license. The party using the other's
4 Vector Generating System and/or games shall render written
5 statements to the other within fifteen (15) days after each month
6 during the term of this agreement, and shall pay to the other
7 with each statement the amount of all royalties due for sales
8 during the preceding months. Each royalty report shall contain,
9 at a minimum, a detailed list of all units shipped with serial
10 number and the price for which each unit was sold".

v

Said defendants have not made the sales report as required although demand has been made. No royalties on the sales have been paid since the inception of the contract. Plaintiff is informed and believes and thereon alleges that said defendants will not account at any time, and will make no payment at any time, or of any kind, pursuant to the contract terms to plaintiff.

VI

The licensing agreement permits both plaintiff and defendant to manufacture and distribute items licensed to the other, that is, to compete in those items, both as to their sale and manufacture. Plaintiff is informed and believes and thereon alleges that if said defendants are permitted to manufacture and distribute items licensed by plaintiff to them without an accounting and payment thereon to the plaintiff as provided in the license agreement said defendants will be able to exploit the selling field of the items, secure distributors, flood the market, and make ineffectual the efforts of plaintiff to manufacture and distribute

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3 the items itself. Plaintiff is informed and believes and thereon
4 alleges that the monies that are due to plaintiff, and will
5 become due progressively under the contract are needed and necess-
6 ary to enable plaintiff to carry on its own business, and, if
7 it does not receive them, it will be irreparably damaged in
8 that defendant may secure a monopoly, or so narrow the field
9 in which plaintiff can sell as to make the operation of its
10 business impossible.

VII

12 Plaintiff has accounted to defendant as to all those things
13 required of it under the contract, has paid the royalties owed
14 and shown by its accounting, and has performed all other con-
15 ditions to be performed by him under the terms of the contract.

VIII

17 Plaintiff is informed and believes and thereon alleges
18 that defendant has, during the period between December 1, 1979
19 and the date of trial, made numerous sales of devices manufactured
20 and sold pursuant to the license from plaintiff to said defendants
21 and under the terms and conditions of the contract.

IX

23 Said defendants have full and complete knowledge of the
24 number of licensed items manufactured and sold during said period;
25 plaintiff has no knowledge of the number of units sold, the place
26 where sold, or the amount of the sales of any of them; and an
27 accounting for said sales is necessary to discover the amount
28 owed by defendant to plaintiff.

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4 Said defendants' breach in failing and refusing to account
5 has made necessary the filing of this action by plaintiff and
6 will make necessary the filing of an action every month of every
7 year through the terms of the contract, and thus said defendants'
8 continuous breach will cause a multiplicity of suits unless the
9 said defendants are enjoined and restrained from manufacturing,
10 selling, using or otherwise commercializing the items so licensed.

11

XI

12 The contract provides that if either party thereto sues
13 and prosecutes a lawsuit or any other claim or dispute arising
14 out of or relating to the agreement or any breach thereof, the
15 prevailing party shall be entitled to recover from the losing
16 party reasonable expenses, attorneys' fees and costs. Plaintiff
17 has employed a law office in the instant action and obligated
18 himself for reasonable attorneys' fees herein; therefore, on
19 judgment herein, defendant is liable to plaintiff for such reason-
20 able fees.

21

22 WHEREFORE, plaintiff prays judgment against the defendants,
23 and each of them, as follows:

24 1. For the principal now due and owing on said note in
25 the amount of FOUR HUNDRED AND NINETY-ONE THOUSAND NINE HUNDRED
26 AND FORTY-TWO DOLLARS (\$491,942);

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3 2. For interest on the principal, according to the terms
4 of the contract, at eight (8%) percent per annum from January 1,
5 1980;

6 3. That defendant render an accounting under the terms
7 of the agreement, and, on said accounting, judgment be entered
8 against defendant for the amount so found due;

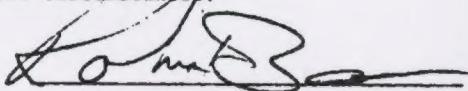
9 4. That a permanent injunction be issued, restraining
10 defendant from manufacturing, selling, using or otherwise
11 commercializing the product, as aforesaid;

12 5. For reasonable attorneys' fees;

13 6. For costs of suit incurred herein;

14 7. For such other and further relief as the court may
15 deem just and proper under the circumstances.

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17 DATED: April 7, 1980



ROBERT H. BASIE
Attorney for Plaintiff

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